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6 IN THE UNITED STATES DISTRICT COURT

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10 PETRA MARTINEZ,
11 Plaintiff, No. C 09-05630 WHA
12 v.
13 AMERICA'S WHOLESALE LENDER,
14 COUNTRYWIDE HOME LOANS
15 SERVICING LP, BANK OF AMERICA,
RECONTRUST COMPANY, AND BANK
OF NEW YORK MELLON
16 Defendants.
17

18 **ORDER DENYING
PLAINTIFF'S MOTION TO
REMAND AND VACATING
HEARING**

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23 **INTRODUCTION**

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29 This is a motion to remand an action to state court in a foreclosure dispute. For the
30 reasons set forth below, plaintiff's motion to remand is **DENIED**. The hearing on Thursday,
31 February 25, 2010, is **VACATED**.

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34 **STATEMENT**

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1 the hearing, defendants have filed a motion for summary judgment as ordered (Dkt No. 18), and
2 also filed an opposition to the motion for remand (Dkt No. 25). The motion for summary
3 judgment is still pending and the hearing is set for March 4.

4 The facts of the case are as follows. In January 2006, plaintiff borrowed \$1.5 million from
5 defendant America's Wholesale Lender. The loan was secured by her home in Salinas,
6 California. The loan was an interest-only, adjustable-rate mortgage with a fixed interest rate of
7 6.5 % until March 2013. According to the loan application, plaintiff planned to use a little over
8 \$1 million from the loan to refinance the preexisting mortgage on the property, and received the
9 rest of the loan, about \$420,000, in cash. In addition to the \$1.5 million mortgage on the
10 property, plaintiff also secured a home equity line of credit on the property and borrowed
11 \$300,000 in March 2006.

12 In May 2008, plaintiff stopped making payments on her mortgage loan. In January 2009,
13 defendant Recontrust Company filed and recorded a notice of default against the property, stating
14 that plaintiff was in breach of the loan in the amount of \$79,555.75. In April 2009, defendant
15 Recontrust filed a notice of trustee's sale against the property, setting the sale date as May 20. In
16 August 2009, plaintiff initiated this action in the Monterey County Superior Court and filed a *lis*
17 *pendens* against the property, which stalled the foreclosure proceedings on the property.

18 Plaintiff's complaint alleges several state law claims and violations of federal statutes
19 against defendants. Plaintiff claims that defendants violated the Real Estate Settlement Practice
20 Act, the Federal Fair Debt Collections Act, the Rosenthal Fair Debt Collection Practices Act,
21 California Business & Professional Code Section 17200 and that they intentionally and
22 negligently inflicted emotional distress on her. She asserts claims for slander of title against the
23 property, declaratory relief, accounting, and quiet title.

24 ANALYSIS

25 Defendants removed this action to federal court on the basis of federal-question
26 jurisdiction on November 30. Defendants also filed a motion to dismiss on December 7. Plaintiff
27 filed a notice to dismiss her two federal claims and a motion to remand on December 29. Plaintiff
28 seeks remand to state court on two grounds: (1) since plaintiff dismissed her federal claims on

1 December 29, the only remaining claims are state law claims and (2) the removal to federal court
2 was defective because defendants failed to join defendant Mortgage Electronic Registration
3 Systems, Inc., (“MERS”) in their notice of removal.

4 **A. FEDERAL-QUESTION JURISDICTION**

5 Plaintiff seeks to dismiss her federal claims under Rule 41(a)(2). Rule 41(a)(2) provides
6 that a plaintiff may dismiss an action without a court order by filing a notice of dismissal before
7 the opposing party serves an answer or a motion for summary judgment. Plaintiff argues that she
8 may use either Rule 15(a) or Rule 41(a)(2) to dismiss only her federal claims. Plaintiff is
9 incorrect. Plaintiff cites to *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1392 (9th Cir.
10 1988), and *Hells Canyon Preservation Council v. United States Forest Service*, 403 F.3d 683, 688
11 (9th Cir. 2005) to support her position, but these decisions do not support her argument that Rule
12 41(a)(2) and Rule 15(a) are functionally interchangeable. These decisions stand for quite the
13 opposite. They held that when a plaintiff dismisses “one or more but less than all of several
14 claims, but without dismissing as to any of the defendants,” Rule 15(a) is the appropriate
15 mechanism. *Hells Canyon*, 403 F.3d at 688. Thus, plaintiff may not amend the complaint and
16 dismiss only federal claims using Rule 41(a)(2).

17 Plaintiff’s notice to dismiss federal claims is construed, instead, as an attempt to amend
18 the complaint pursuant to Rule 15(a)(1). Rule 15(a)(1) provides that:

19 A party may amend its pleadings once as a matter of course within:

20
21 (B) if the pleading is one to which a responsive pleading is
22 required, 21 days after service of a responsive pleading or 21 days
23 after service of a motion under Rule 12(b), (e), or (f), whichever is
24 earlier.
25 Defendants have not yet filed an answer but they have filed a motion to dismiss plaintiff’s
26 complaint under Rule 12(b)(6) on December 7. Thus, in order to amend her complaint as a matter
27 of course under Rule 15(a)(1), plaintiff must have sought to amend her complaint on or before
28 December 28. Plaintiff filed to dismiss her federal claims on December 29, one day after the 21-
day deadline. Plaintiff may not amend her complaint as a matter of course, but must amend in
accordance with Rule 15(a)(2), which states that parties may amend only with the opposing
party’s written consent or the court’s leave.

1 Rule 15(a)(2) states that the court should freely give leave to amend when “justice so
 2 requires”, but the Court does not find such leave is warranted in this instance. Plaintiff seeks to
 3 dismiss her federal claims for the sole reason of avoiding federal court. Substantial efforts have
 4 already been expanded already by this Court and by the opposing party in this action. Defendants
 5 have filed a motion to dismiss, a motion for summary judgment, opposition to plaintiff’s notice of
 6 dismissal of federal claims, and opposition to the motion to remand.

7 Thus, plaintiff’s notice of dismissal of federal claims is treated as a motion to amend her
 8 complaint and the motion is **DENIED**.¹ Accordingly, federal claims remain in this action and
 9 plaintiff’s argument as to why the Court should remand this action based on lack of federal claims
 10 is moot.

11 **B. DEFECTIVE NOTICE OF REMOVAL**

12 Plaintiff asserts that the removal federal court was defective because defendant MERS did
 13 not join the removal petition. With limited exceptions, all of the defendants in the state court
 14 action must consent to and join in the petition for removal. Under 28 U.S.C. 1446 (b), “the notice
 15 of removal of a civil action . . . shall be filed within thirty days after the receipt by the defendant,
 16 through service or otherwise, of a copy of the initial pleading” Implicit in this mandate is a
 17 requirement that all defendants must join the removal petition. But this rule only applies to those
 18 defendants properly served and joined in the action. *Emrich v. Touche Ross & Co.*, 846 F.2d
 19 1190, 1193 n.1 (9th Cir. 1988) (citations omitted). The removing party has the burden of
 20 affirmatively explaining the absence of any co-defendants in the event that any defendant did not
 21 join the removal petition. *Prize Frize, Inc., v. Matrix (US) Inc.*, 167 F.3d 1261, 1266 (9th Cir.
 22 1999) *overruled on other grounds by Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676, 680
 23 (9th Cir. 2006).

24 Here, defendants explain that the reason defendant MERS did not join the removal
 25 petition is that plaintiff did not serve actually serve it. Defendant MERS, also known as
 26 Mortgage Electronic Registration Systems, Inc., is a corporation organized in Delaware. There is

27
 28 ¹ This order also notes that plaintiff’s attempt to amend her complaint fails to comply with Civil Local
 Rule 10-1 which requires that “[a]ny party filing or moving to file an amended pleading must reproduce the
 entire proposed pleading and may not incorporate any part of a prior pleading by reference.”

1 an entity with the very same name registered in California by John Brosnan.² Plaintiff in fact
2 served the unrelated California entity (presumably by mistake), not defendant MERS. This order
3 finds that because plaintiff did not serve defendant MERS, the absence of MERS in the removal
4 petition did not render the removal defective.

5 **CONCLUSION**

6 For the foregoing reasons, plaintiff's motion to remand this action is **DENIED**. The
7 hearing on Thursday, February 25, 2010, is **VACATED**.

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9 **IT IS SO ORDERED.**

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11 Dated: February 22, 2010.

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13 WILLIAM ALSUP
14 UNITED STATES DISTRICT JUDGE
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25 ² John Brosnan is a frequent litigant who has appeared before the undersigned in unrelated cases. Mr.
26 Brosnan incorporated and registered an entity named MERS in California, and then attempted to enter into a fee
27 arrangement with the Delaware corporation MERS for forwarding legal documents that were actually intended
28 for the Delaware corporation, but had been sent to Mr. Brosnan instead in mistake. Delaware MERS refused
Mr. Brosnan's offer and sent Mr. Brosnan a cease and desist letter that he stop using the name of MERS and
that he return any documents intended for the Delaware MERS. The Delaware MERS then initiated an action in
this district against Mr. Brosnan, No. 09-3600, and obtained a preliminary injunction preventing him from using
the MERS name.